IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL APPEAL CASE NUMBER 50 OF 2003

BETWEEN:

HON J Z U TEMBO **IST PLAINTIFF**

HON KATE KAINJA **2ND PLAINTIFF**

And

THE ATTORNEY GENERAL **DEFENDANT**

CORAM: THE HONOURABLE JUSTICE L P CHIKOPA

T Mvalo of Counsel for the Plaintiffs

P Kayira Principal State Counsel for the Defendant

Namponya Mrs. Official Recorder

Chauma Mrs. Court Reporter

Chikopa, J

JUDGMENT

BACKGROUND

This case has had a chequered history. And it is important for purposes of putting many issues raised in this case in perspective that we narrate this history. In doing so we are, we should make it clear, only restating matters that are not in dispute.

It is fair to say that at least up to June of 2002 there was a serious division within a Malawian political party known as Malawi Congress Party (hereinafter called MCP). Such was the extent of the division that there were now in the party two factions. One headed by a gentleman known as Gwanda Chakuamba and the other by a gentleman known as John Tembo who also happens to be the first plaintiff in this matter. In furtherance or as part of this division the Tembo faction decided to force the MCP to hold a convention. A Mr. Kampanje Banda accordingly took out an action in the Lilongwe District Registry under Civil Cause 645 of 2001 seeking a court order that a national convention of the MCP be convened and held. That action was dismissed as being grossly irregular, frivolous, and vexatious and a waste of time and an attempt to draw the court into a club wrangle. Kampanje Banda then moved to the Principal Registry. On 6th June 2001, he took out an originating summons seeking an order mandating the Defendant in that case, the above mentioned Gwanda Chakuamba immediately or within such time as the court may deem fit, to convene an extraordinary annual convention of the Malawi Congress Party. Before the originating summons was heard the Tembo faction decided to hold an MCP convention at the Natural Resources College (NRC) in Lilongwe on June 22nd 2002. Gwanda Chakuamba thought that in terms of the MCP constitution it was only him as party president who could lawfully convene an MCP convention. Seeing as he had not convened the convention to be held at NRC on 22nd June 2002 he formed the view that such a meet was unconstitutional. The people that had convened it did not have the mandate to do so. Chakuamba therefore by exparte summons obtained an injunction stopping the convention from being held. The order of injunction, obtained on June 17th 2002, was in the following terms:

‘IT IS ORDERED that an injunction is hereby granted restraining the Plaintiff by himself, his servants, or agents, or otherwise any member of the Malawi Congress Party howsoever from holding the Malawi Congress Party Convention scheduled for 22nd June 2002 in Lilongwe or any other date and place until the various committees constituted under the Malawi Congress Party structures the Constituency, District and Regional Committees have renewed their respective mandates and/or further until determination of these proceedings or until further order.

If you disobey this order you may be found guilty of contempt of court and may be sent to prison or fined or your assets may be seized.’(Sic)

The plaintiff in this case was Kampanje Banda but suing in a representative capacity. He

was not being happy with the order of injunction. He on June 19th 2002 applied for a vacation of the said order. The application was heard on 20th June 2002. It was dismissed on June 21st 2002. The convention was nevertheless held on 22nd and 23rd June 2002.

Gwanda Chakuamba then took out a motion for the committal of **inter alia** John Tembo and Kate Kainja. We set out parts of the said motion that we thought relevant for our present purposes:

'That Hon. John Z U Tembo, Hon Kate Kainja and Potiphar Chidaya be committed to prison for their contempt of court in disobeying and/or aiding and abetting the defying and flouting of Orders of this court in that members of MCP who had first hand knowledge of the contents of the injunction restraining members of the Malawi Congress Party from holding a MCP convention called for 22nd June 2002 in Lilongwe or any other date or place until the various committees under the Malawi Congress Party organizational structures at Constituency, District and Regional Committee levels had renewed their respective mandates and/or until the determination of the Originating Summons herein or until further order and with such knowledge, encouraged and assisted the plaintiffs and some members of the Malawi Congress Party in holding a MCP Convention on 22nd to 23rd June 2002 at Natural Resources College in Lilongwe and participated thereof.

A declaration that the said ….., Hon. J Z U Tembo, Hon. Kate Kainja and Potiphar Chidaya with tacit knowledge assisted the holding of a MCP Convention, which was an outrageous conduct of defying the Court orders, thereby undermining the authority of the High Court of Malawi, trivializing the rule of law and compromising the due course of justice.'(Sic)

At trial the current plaintiffs prayed **inter alia** that they were not aware of the existence or contents of the order of injunction of June 17th 2002. After a full trial the Honorable Court found as a fact that Honourables John Tembo and Kate Kainja were served with the said order of injunction. In the exact words of the court that they 'had full notice and knowledge of the injunction'. At the conclusion of the trial the said court said:

'I am satisfied beyond reasonable doubt that.., Hon John Tembo, Hon Kate Kainja …….. Had notice of the injunction granted on 17th June 2002'.

As to whether there was a breach of the order of injunction of June 17th 2002 the court said:

‘I find it as a fact and I am satisfied to the requisite standard that the injunction grantee on 17th June 2002 was indeed disobeyed as the convention which was stopped did take place.’

On whether our plaintiffs had actually breached the order of injunction the court said:

‘I now turn to Hon John Tembo. He is leader of this faction of the Malawi Congress Party. He must have sanctioned the convention. A meeting of this magnitude cannot take place without his approval. I have found that he had notice of the injunction. It was within his powers to stop the convention so as to comply with the court order. He did not. Instead he had signified his willingness and desire to be elected President at the convention and he was indeed elected President. I am aware that he was not a party to the action and I have already dealt with that aspect of the matter. To allow himself to be elected President, it means that he had encouraged that the convention be held so that he could be elevated to that post. In the result I find him guilty of contempt of court’. (Sic)

Regarding Hon Kate Kainja the Honorable Court had the following words:

‘She is Secretary General of the party. The injunction was directed at all members of the party including herself. She participated in the convention. Mr. Kampanje Banda called upon Mr. Majoni to chair the convention through her. Before the convention was held, she had written a letter inviting Hon Chakuamba to the convention. This means that Hon Kainja not only participated at the convention but she had also taken part in organizing same. Indeed the post of Secretary General is crucial to the holding of a convention. I also find her guilty of contempt’. (Sic)

Our two plaintiffs were following their being found guilty of contempt sentenced each to a fine of K200000.00 in default 12 months IHL. The fines were paid. There was no appeal either against sentence or conviction.

On December 12th 2002 Hon Paul Maulidi Member of Parliament for Blantyre North who is also Deputy Secretary General of the United Democratic Front, another political party operating in Malawi, successfully moved the National Assembly sitting at Lilongwe to pass a motion declaring that the contempt in respect of which our plaintiffs were convicted was a crime involving dishonesty or moral turpitude. The National Assembly duly did. The Honorable Speaker of the National Assembly then proceeded to wrap up the issue in the following words:

‘Honorable Members I now put the question that the Honorable Speaker do publish in the gazette notice under section 63 subsection 2 of the Constitution that the seats of

Honorable John Zenus Ungapake Tembo, Member of Parliament for Dedza South Constituency and Honorable Kate Kainja , Member of Parliament for Dedza South West constituency have become vacant by virtue of a conviction of the two Members of Parliament by the High Court of Malawi of contempt of court which is a crime involving both dishonesty and moral turpitude.

Honorable Members, by your vote ……. The effect of your vote on this motion is that the Speaker will now proceed to gazette the seats vacant.' (sic)

The motion was passed on December 13th 2002. we should say at this early stage that we do not understand the motion as having declared the seats of our plaintiffs vacant. It only, in simple language, by a majority decision gave the opinion that the contempt of court with which the plaintiffs were convicted was a crime involving dishonesty or moral turpitude. The seats of our plaintiffs then fell vacant by operation of section 63(1)(e) of the Constitution. That is also how we understand the Honorable Speaker's pronouncement quoted above.

On December 18th 2002 the plaintiffs were granted an order of interlocutory injunction by the High Court sitting at Lilongwe restraining **inter alia** the Speaker from executing the motion. On December 27th 2002 the same High Court dissolved the injunction upon the application of the Honorable the Attorney General. Our plaintiffs appealed to the Malawi Supreme Court of Appeal. The Malawi Supreme Court of Appeal upheld the dissolution of the injunction but left open the issue of whether the plaintiffs could proceed by way of judicial review or not.

Clearly our plaintiffs must have taken note of the Supreme Court's not so subtle hint that it was perhaps not most appropriate to proceed by way of Judicial Review. They decided to proceed by way of Originating Summons and filed the papers in respect thereof with this registry.

THE PLAINTIFFS' CLAIM

Courtesy of the originating summons referred to above the plaintiffs sought the determination of this Court on the following questions:

1. whether the provisions of section 51 of the Constitution of the Republic of Malawi(the Constitution) apply to a serving member of Parliament.

2. considering all the circumstances of the committal proceedings in civil cause No 1841 of 2001 filed at the Principal Registry, whether the relevant contempt was

criminal or civil.

3. if the answer to question 2 above is that the relevant contempt was civil then whether in that case the Plaintiffs became eligible to be disqualified as members of Parliament under section 51(2)(c) of the Constitution since that section talks of conviction of a crime(underlining supplied for emphasis).

4. if the answer to question 2 above is that the contempt was criminal then whether on a proper construction of section 51(2)(c) of the Constitution the relevant contempt was a crime involving dishonesty or moral turpitude(underlining supplied for emphasis).

5. If the answer to question 1 above is that section 51 of the Constitution does not apply to a serving member of Parliament or if the answer to question 4 is that although the contempt was criminal it did not involve dishonesty or moral turpitude, a declaration by the Court that the Plaintiffs did not qualify to have their seats declared vacant in terms of section 51(2)(c) of the Constitution and an order that:

(a) The declaration of their seats as vacant was a nullity;

(b) The plaintiffs have always been members of Parliament representing their respective constituencies and are still members of Parliament;

(c) The plaintiffs as members of Parliament are fully entitled to all remuneration including the remuneration so far illegally withheld from them, and to all privileges of a Member of Parliament.

6. Whether in fact the expulsion of the plaintiffs from Parliament was not an infringement of their political rights under section 40 of the Constitution

7. Whether section 52(2) is not inconsistent with sections 40 and 42(2) of the Constitution and to that extent antagonistic with the values which underlie an open and democratic society which values a court of law in interpreting the Constitution is required to promote according to section 11(2) of the Constitution.

8. Considering that the proceedings relating to the motion to declare vacant the seats of the Plaintiffs were conducted in a manner that breached Standing Orders of the National Assembly, notably Standing Orders 18 and 25(2), whether those proceedings and the motion passed thereunder were valid.

9. Whether in fact Parliament had power to disqualify the Plaintiffs from their seats in Parliament or whether such power lies with the Electoral Commission.

10. Whether in fact the expulsion of the Plaintiffs from Parliament was not in breach of the human rights enshrined in the Constitution as well as the Universal Declaration of Human Rights to which Malawi is a signatory, and particularly Article 21(1) thereof which guarantees everyone the right to take part in the government of his country directly or through freely chosen representatives, and Article 21(3) which says the will of the people shall be the basis of the authority of government and that this will shall be expressed in periodic and genuine elections which shall be by universal and

equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

11. Whether the Plaintiffs had a real opportunity of hearing considering the way the proceedings for their removal from Parliament were conducted.

12. Costs

When the plaintiffs addressed us **viva voce** they prayed for an order in favor of the Plaintiffs that:

1. The National Assembly usurped the powers of the Courts by assuming the function of interpreting matters of laws, and thereby acted **ultra vires**. Accordingly that its decision is a nullity;

2. The contempt in question was in fact of a civil nature and therefore as it was not a crime it fell outside of the realms of section 51(2)(c) of the Constitution. Accordingly that it was wrong to declare the plaintiffs' seats vacant under that section;

3. In the circumstances the plaintiffs were not at all eligible to have their seats declared vacant;

4. The contempt in question did not involve dishonesty or moral turpitude as envisaged by section 52(2)(c) of the Constitution where the offence is required to be of a criminal nature;

5. The decision was arrived at in breach of principles of natural justice, particularly the need to afford the other party adequate opportunity to be heard;

6. The decision was arrived at in breach of the Constitutional right of the plaintiffs to lawful and procedurally fair administrative action;

7. The decision infringed the plaintiffs' political rights under the Constitution;

8. In the result, the plaintiffs have always been members of the National Assembly in the eyes of the law, and accordingly are fully entitled to, and have always been fully entitled to attend sittings of the National Assembly, and to all remuneration due to them as members of the National Assembly, and to all privileges and immunities of a member of the National Assembly; and

9. The defendant may be condemned in costs of this action.

It is clear in our view that the orders sought by the plaintiffs are consequent upon our determination of the matters presented to us courtesy of the Originating Summons. We say this because we do not want to create the impression that the parties' submissions by themselves in any way brought up new issues for our determination.

GENERAL PRINCIPLES OF LAW

We realize from the outset that we are dealing with issues of a constitutional nature. We think it prudent therefore that we should restate some basic, and shall we say handy as well, principles of law that might be of use as we determine this case.

The case of **Fred Nseula v the Attorney General and** Malawi Congress Party MSCA Appeal Number 32 of 1997(unreported) is instructive in so far as the interpretation of constitutions is concerned. The Honorable Court approved the following sentiments regarding the interpretation of Constitutions:

'A constitution is a special document which requires special rules for its interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution. Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intentions of Parliament. It is an elementary rule of Constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution.'

The Honorable Court also cited with approval the Indian case of **Galapanv State of** Madras (1950) SCR 88 at 109 where the court said as follows:

'The Constitution is a logical whole each provision of which is an integral part thereof and it is therefore logically proper and indeed imperative to construe one part in the light of the other parts.'

ISSUES

With the greatest respect we are of the humble view that there is so much chaff surrounding the ONE issue raised by the plaintiffs there is the real danger of one going on a wild goose chase. This, it must be said arose out of both parties' inability to file with the court affidavits that complied with Order 41 of the Rules of the Supreme Court (RSC). It is trite knowledge that affidavits must contain only depositions as to facts. The ones we have herein contained in the main Counsels' opinion about various sections of our Constitutions, international human rights instruments generally, the political shenanigans going on in this jurisdiction at around the time the matters the subject of this litigation arose and some facts. Without in any way suggesting that it is all right to less than adhere to the rules of procedure we allowed the matter to proceed. We did not think that anybody was going to be prejudiced thereby. Neither did we think it made good sense to throw out the matter only to have it come back later on the basis of not so important rules of

procedure. It results in the criminal waste of time and treasury. Our brother Kapanda J when faced with a similar situation in **Brown Mpinganjira & Six Others** Misc. Civil Cause No 3140/2001 only hoped that the Bar would henceforth proceed correctly procedurally. We doubt whether we can better such sentiments.

For our part this matter revolves around the finding by the National Assembly that the contempt of court with which our plaintiffs were found guilty is a crime involving dishonesty or moral turpitude. In our view what is important should be to determine whether such conclusion is correct or not. We do notice however, and we say this herein above, that the plaintiffs raised several other questions for our consideration. These are questions touching on a perceived conflict between various constitutional provisions and whether section 51 of our Constitution applies to a serving Member of Parliament. These are in paragraphs 1,6, 7, 8, 9 and 10 of the Originating Summons. We shall as much as we can, and as long as we feel there is relevancy in so doing, express an opinion on such questions. Now though we think we should get to resolve the small matter of jurisdiction.

Does this court (read the High Court) have jurisdiction to hear and determine this matter.

The plaintiffs looked at the issue of jurisdiction from different angles. The defendants never expressed a view. To be fair to them they proceeded on the assumption that this court has the requisite jurisdiction. But in the light of what we have said about the plaintiffs' views on jurisdiction we feel duty bound to say a few words if only to confirm that we are all on the same train proceeded in the same direction.

As we understood the plaintiffs they firstly argue that this court has jurisdiction to hear a challenge against a decision of the National Assembly or Parliament or indeed both. Similarly this court can review such a decision. As authority they cited sections 9 and 108(1) and (2) of the Constitution. They also cited several case authorities. Both from within the jurisdiction and without. The latter **are Brown Mpinganjira and Six others v the Speaker of the National Assembly and the Attorney General**, Miscellaneous Civil Cause Number 3140 of 2001(unreported), Gwanda**Chakuamba and Hetherwick Ntaba v The Speaker of the National Assembly**, Civil Cause No 95 of 2001(unreported), and **Jan Sonke and Joe Manduwa v The Speaker of the National Assembly and the United Democratic Front,** Civil Cause No 140 of 2002(unreported).

We do not wish to belabor the point - and this mainly because the court opinions in the cases cited above were on interlocutory applications - but it is clear that section 108(2) of the Constitution gives the High Court powers to review any law, and any action or decision of the Government for conformity with this Constitution. The subsection is in the following terms:

'The High Court shall have original jurisdiction to review any law, and any action or

decision of the Government, for conformity with this Constitution, save as otherwise provided but this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law'.

We have no problem in concluding that 'government' as used in section 108 above includes the three organs of government. In so far as therefore our plaintiffs wish to have this court review the National Assembly's decision that the contempt of court with which they were convicted of is (a) a crime and (b) it involves dishonesty or moral turpitude our conclusion has to be that we can and we will hear such an application. The only problem, as we see things, is that our plaintiffs raise two other issues regarding jurisdiction which we feel should be resolved now.

Firstly they contend that as part of the powers granted to this court under section 108 this court has the power to go beyond the law, action or decision complained of to determine whether in the case of the Legislature such a decision is procedurally legal.

Secondly they also contend, as we understand them, that section 9 grants the exclusive primary authority of **inter alia** interpreting our Constitution and all laws to only the Judiciary and that therefore the Legislature had no business in the instant case to sit down and consider whether **'**contempt of court was **a crime involving dishonesty or moral turpitude'**. What the National Assembly should have done, in the view of our plaintiffs, was to adjourn the matter and seek the Judiciary's opinion on whether contempt of court is a crime involving dishonesty. And that having done so and upon the Judiciary answering in the positive they would have then gone on to declare the seats vacant. Because the National Assembly did not do so, our plaintiffs further argue, it usurped the constitutional function of the Judiciary. Its decision cannot be valid in law. It is **void ab initio** for want of jurisdiction.

There is a subsisting argument as to whether the Judiciary should go beyond the decision being challenged or not. In the instant case it is our opinion that whether to go beyond the National Assembly's decision that contempt of court is a crime involving dishonesty and moral turpitude can only arise once we conclude that the decision in issue is correct. If we declare that it is invalid as not being a crime or not being a crime involving dishonesty or moral turpitude then going behind the declaration becomes an exercise in futility seeing as there would be no decision to go behind or review. Rather than say now whether this Court can go by way of review behind/beyond the decision being reviewed we shall await a finding whether the House's decision that the relevant contempt was a crime involving dishonesty or moral turpitude was correct or not.

On whether the National Assembly usurped the Judiciary's powers in considering whether contempt of court is a crime involving dishonesty or moral turpitude we have, with respect, to disagree with our plaintiffs. Similarly we have to disagree with the proposition that once a matter of legal interpretation arises in the National Assembly it becomes obligatory to pass it on to the Judiciary for its determination/opinion.

For our part we think that the former line of thought came originally out of the misconception that a decision of the Speaker in the House was final and could not be challenged in a court of law. That kind of thinking has since been discarded. A decision of the Speaker is capable of being challenged and can be quashed if found not to conform to the Constitution or the law. The foregoing argument does not in our view go on to say that the Speaker or indeed the National Assembly/Legislature cannot make a decision that involves the interpretation of the constitution/law within the House. It can. The only thing it emphasizes, and which we would also want to emphasise, is the fact that such a decision is reviewable by the judiciary to ensure that it conforms with the law and the Constitution. That in our view is the correct understanding of section 108 of the Constitution.

We are also aware that some quarters think that section 63(3) of the Constitution obliges the Speaker to adjourn proceedings of the National Assembly and await a judicial pronouncement once the matter before it concerns the interpretation of the law or the Constitution. To be fair to those that think thus we are willing to say that it is perhaps the good thing to do. We are however unable to agree that it is unconstitutional or unlawful for the Speaker not to do so or for the National Assembly to proceed with the matter to finality.

The section provides:

‘The Speaker may, upon a motion of the National Assembly, postpone the declaration of a vacant seat for such period as that motion prescribes so as to permit any member to appeal to a court or other body to which an appeal lies against a decision which would require that member to vacate his or her seat in accordance with this section.’

In so far as we understand it the section does not oblige the Speaker to postpone the proceedings once the interpretation of the law or Constitution comes up. On the contrary it is obvious that the section permits a motion to be moved in the House that will have the effect, if it goes through, of postponing whatever decision the House wanted to make until a judicial pronouncement is made on the interpretation in dispute. If the motion to defer fails to go through however the House is mandated to debate the declaratory motion to finality. If the member is not satisfied he can apply to the Courts to have the declaration/decision reviewed for conformity with the Constitution. It cannot be said that in first making the declaration and not referring the matter to the courts the House has usurped the former’s constitutional function with the result that such a declaration is void. The only time an obligation rises on the part of the Speaker to defer a matter pending a judicial pronouncement is when a motion in that regard has been passed by the House itself.

We are unable therefore to accede to the argument that the National Assembly’s decision that the relevant contempt is a crime involving dishonesty or moral turpitude is **void ab initio** because the National Assembly made it without the requisite jurisdiction and in a manner tantamount to the usurpation of the judicial function by the former.

We now go back to determine the issues as raised by the plaintiffs not necessarily in the order in which they appear in the summons. This is only for purposes of convenience.

Whether section 51 of the Constitution applies to a serving member of Parliament

The marginal note to Section 51 abovementioned talks about qualifications of Members of Parliament. The opening words of subsection 1 read:

'A person shall not be qualified to be nominated or elected as a Member of Parliament unless that person;'

The section then provides that the said person has to be; a citizen of the Republic of Malawi who has attained the age of 21 years; is able to speak and read the English language well enough to be able to take an active part in parliamentary debates and is a registered voter in a constituency.

Subsection 2 on the other hand provides that no person shall be qualified to be nominated or elected as a Member of Parliament who; owes allegiance to a foreign country; is, adjudged under any law in force in the Republic, adjudged or otherwise declared to be mentally incompetent; has been within the last seven years convicted by a competent court of a crime involving dishonesty or moral turpitude; is an undischarged bankrupt having been adjudged or otherwise declared bankrupt under any law in force in this country; holds or acts in any public office or appointment which by law disqualifies her from being a member of Parliament; belongs to and is a serving member of the Malawi Police Force or the Defence Forces of Malawi and has within the last seven years been convicted by a competent court of any violation of any law relating to election of the President or elections of members of Parliament.

As a stand-alone section it is clear that section 51 abovementioned refers only to qualifications of those that may be nominated or elected as members of Parliament. We know however that the plaintiffs did not bring in this section so that we should discuss whether or not the plaintiffs are qualified to stand as members of Parliament. We also know that the Nseula case says that 'it is an elementary rule of Constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution**'**.

The case at hand does not involve the qualifications of those that want to become Members of Parliament. It involves the 'removal' (we use this word very advisedly) from their seats in the National Assembly of our plaintiffs. We will achieve little, if anything, by looking at section 51 of the Constitution in isolation in so far as removal of members of Parliament from their seats is concerned. We should look at all provisions in the

Constitution that bear on a member's removal from the House. It seems clear to us in those circumstances that we, have to look at section 63 of the Constitution. It deals with vacancies in the National Assembly. The section provides that the seat of a member of the National Assembly shall become vacant **inter alia**:

'If any circumstances arise that if he or she were not a member of the National Assembly, would cause that member to be disqualified for election under this Constitution or any other Act of Parliament'.

In simpler language a member's seat shall fall vacant if while still a member he **inter alia** ceases to be a citizen of Malawi; somehow becomes unable to read the white man's language or to take an active part in Parliamentary business, somehow ceases to be a registered voter in a constituency; is adjudged to be a bankrupt or mentally incompetent; becomes a member and starts serving in the Malawi Police Service or the Defence Forces of Malawi; is convicted by a competent court of any violation of any law relating to election of the President or members of Parliament or is convicted of any crime involving dishonesty or moral turpitude. To answer the question posed by our plaintiffs therefore we would say that section 51 of the Constitution applies to serving members of Parliament in so far as their 'exclusion' from their seats is concerned. Applied to this our case the question still remains whether contempt of court is a crime and if yes whether it involves dishonesty or moral turpitude. If the answers be in the negative sections 51 and 63 will not be engaged. If yes they will be.

'Considering that the proceedings relating to the motion to declare vacant the seats of the plaintiffs were conducted in a manner that breached standing orders of the National Assembly, notably Standing Orders 18 and 25(2), whether those proceedings and the motion passed were valid'(sic)

We doubt whether our plaintiffs are certain about the issue(s) they want us to determine courtesy of paragraph 8 of the Originating Summons. It appears to us that in one part our plaintiffs present us with a fait accompli to wit the fact the proceedings in issue were in breach of Standing Orders 18 and 25(2). At the same time they ask us whether the proceedings in issue and the motion passed thereunder are valid. We have no doubt whatsoever that when our plaintiffs ask whether the proceedings and the motion are valid they do so in view of the fact that Standing Orders 18 and 25(2) were not complied with. If we might say so, we are of the opinion that our plaintiffs should have first brought into this court the question whether the proceedings were conducted in breach of Standing Orders 18 and 25(2). Depending on our answer to such a question we would have gone on to determine whether or not the said proceedings/motion were/are valid. As the matter is presently put, this Court runs the risk of turning itself into a laughing stock. If we answer the question by saying the proceedings and therefore the motion were not valid we are in effect agreeing with the assertion that the proceedings were conducted in breach of parliamentary Standing Orders without so much as hearing any argument or making

our own decision on it. On the other hand if we say that the proceedings/motion are valid we shall have contradicted ourselves. We will have agreed that the proceedings were conducted in breach of Standing Orders 18 and 25(2) and yet still find the said proceedings and/or motion are valid. It is something we can do without at this stage. Paragraph 8 of the Originating Summons does not, in our view, raise any question for our consideration.

Whether Parliament has power to disqualify the Plaintiffs from their seats in Parliament or whether such power lies with the Electoral Commission.

Assuming the present context there are fundamental questions to be considered here: Firstly were our Plaintiffs disqualified? Secondly was the disqualification by Parliament?

The Constitution in section 49 says about Parliament:

'For purposes of this Constitution, unless otherwise provided, Parliament consists of the National Assembly, the Senate and the President as Head of State'.

Granted the Senate is no more but we cannot seriously say that Parliament disqualified the plaintiffs. Neither can we say, if the events of December 12th and 13th 2002 are anything to go by, that they were disqualified. We are of the view that paragraph 9 of the Originating Summons raises no question for our consideration.

Considering all the circumstances of the committal proceedings in Civil Cause No. 1841 of 2001 filed at the Principal Registry, whether the relevant contempt was criminal or civil

What is contempt of court?

According to the case of **Attorney General v Times Newspapers Ltd** [1991] 2 WLR 994 contempt of court is based not on any exaggerated notion of the dignity of individuals be they judges, witnesses or others but on the duty of preventing any attempt to interfere with the administration of justice. It is according to the Practice Notes to order 52 rule 1 of RSC a term of ancient origin having been used in England since the thirteenth century and probable earlier.

Blacks Law Dictionary 6th Ed defines contempt of court as:

'Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity. Committed by a person

who does any act in contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which has been given.'

Is it a crime or not?

We have no doubt on the basis of precedent that contempt is categorized into civil and criminal contempt. It is a distinction that is not largely appreciated. In the case of Attorney General v Times Newspaper Ltd [1992] AC 191 Lord Oliver said of the distinction:

'A distinction which has been variously described as unhelpful or largely meaningless is sometimes drawn between what is described as civil contempt and criminal contempt'.

Such is the distaste about the distinction that in the case of **Attorney General v Newspaper Publishing plc** [1988] Ch 333 the Court of Appeal in England suggested a reclassification of contempt in which the misleading terms 'civil' and 'criminal' would no longer be used.

And speaking about the difference between criminal and civil contempt the Practice Notes to Order 52/1 RSC (1999 edition) said the chief instance of civil contempt (or 'contempt in procedure') is disobedience to an order of the Court by a party to the proceedings while the chief instance of criminal contempt are contempt in **facie curiae** by any person (e.g. by hurling abuse or an object at the Court) and conduct obstructing or calculated to prejudice the due administration of justice. There are cited therein the cases of **Re Bahamas Islands** [1893] AC 138 at146 and **Seldon** v Wilde [1911] 1 KB 701.

Black's Law Dictionary is more expansive in its classification of contempt. It talks of direct contempt that is committed in the immediate view and presence of the court such as insulting language or acts of violence or so near the presence of the court as to obstruct the due and orderly course of proceedings. These are punishable summarily.

Then there is constructive contempt which are those that arise from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice. This is chiefly used with reference to the failure or refusal of a party to obey a lawful order, injunction, or decree of the court laying upon him a duty of action or forbearance.

Then it comes to civil and criminal contempt. Civil contempt are those quasi contempt which consist in the failure to do something which the party is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. Criminal contempt on the other hand are acts done in disrespect of the court or its process or which obstruct the administration of justice or tend to bring the court into disrespect. A civil contempt is not an offence against the dignity of the court, but against the party in whose

behalf the mandate of the court was issued, and a fine is imposed for his indemnity. But criminal contempt are offences upon the court such as willful disobedience of a lawful writ, process, order, rule, or command of court, and a fine or imprisonment is imposed upon the contemnor for the purpose of punishment. See page 318 – 319 of Black's Law Dictionary.

Is the contempt herein criminal?

To answer this question we have first to define what a crime and also revisit our above references to criminal contempt.

What is a crime?

Both parties resorted to the definition of crime in Black's Law Dictionary 6th edition at page 370. It is clear however that neither party gave us the full definition of crime as therein put. We will not speculate as to why. But rather than go by the definitions given to us via the submissions we will reproduce in full that which appears in the said dictionary which is that crime is:

'A positive or negative act in violation of penal law. An offence against the State or the United States. . …… A crime may be defined to be any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public. A crime or public offence is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either, or a combination, of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or (5) disqualification to hold and enjoy any office of honor, trust, or profit. While many crimes have their origin at common law, most have been created by statute; and, in many states, such have been codified. In addition, there are both state and federal crimes.'(Sic)

Stroud's Judicial Dictionary 3rd edition refers to a definition of crime by Day, J. in Conybeare**v London** School Board [1891] 1 QB 594 where his Lordship said:

'A crime I would define as an offence against the Crown for which an indictment will lie'.

In **Re Moseley** [1893] AC 138 a case also cited in the same edition of Stroud's Judicial Dictionary a crime was defined as:

> ' An offence against the Crown punishable by fine or imprisonment'.

From the above definitions it is clear in our view that a crime involves the breach of duties which an individual owes to the public. It is why in our further view that the

definition in Black's Law Dictionary places emphasis on the State being any one of the 51 states making up the United States of America or indeed the United States of America itself. It is also why the definitions in Stroud's Judicial Dictionary places emphasis on the Crown as being the victim on behalf of His Majesty's subjects.

The above thinking is also the view of three authors of eminence. Sir Carleton Allen says in Legal Duties at page 233 – 234 that:

'Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well being of society, and because it is not safe to leave it redressable only by compensation of the party injured'.

Smith and Hogan in the seventh edition of their book **Criminal Law** at page 17 say that crimes are:

'Wrongs which the judges have held, or parliament has from time to time laid down, are sufficiently injurious to the public to warrant the application of criminal procedure to deal with them'.

H M Hart in 'The Aims of the Criminal Law' (1958) 23 Law and Contemporary Problems, 405 said about crime:

'It is not simply anything which the legislature chooses to call 'crime'. It is not simply anti-social conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a 'criminal penalty'. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community'.

What is Criminal contempt?

In the case of **Re Dunn** [1906] Vict. LR 403 it was talked about in the following terms:

'The essence of contempt of court is action amounting to interference with or obstruction to, or having a tendency to interfere with or to obstruct the due administration of justice'.

In Attorney General v Leveller Magazine Ltd [1979] AC 440 Lord Diplock at 449 defines criminal contempt of court at common law as behavior 'involving an interference with the due administration of justice, either in a particular case or more generally as a

continuous process**'**.

The Practice Notes to Order 52/1 RSC give **inter alia** the following examples of criminal contempt:

i. Contempt in the face of the court;

ii. Words written or spoken scandalizing the Court;

iii. Words written or spoken calculated to interfere with the course of justice;

iv. Acts calculated to prejudice the due course of justice

Above we made some references to criminal contempt obtained from Black's Law Dictionary. We have them in mind even now. We however thought it imprudent for fear of being repetitive to reproduce them at this stage.

In our own jurisdiction in the case of **Osman v Reginam** 1964-66 ALR Mal 595 criminal contempt was referred to as any act done or writing published and calculated to lower the court's authority or any conduct likely to interfere with the administration of justice.

The parties'arguments

Our plaintiffs argue that the contempt in respect of which they were convicted cannot be criminal. There are several reasons they argue thus. We try and recollect them as best as possible.

Firstly they say that the chief instance of criminal contempt is contempt in the face of the court such as hurling abuse or an object at the court or indeed conduct obstructing or calculated to prejudice the due administration of justice. In their view they committed no contempt in the face of the court, they did not hurl abuse or an object at the court neither did they obstruct or prejudice the administration of justice. In so far as they are concerned they disobeyed a judgment or order which in terms of Practice Note No 52/1/8 as read with Practice Note No 52/1/14 is a civil contempt.

Secondly they argue that disobeying an injunction does not fit into the definition of a crime as had from Black's Law Dictionary. As they understand the said definition disobeying an injunction is not a violation of a penal law nor is it an offence against the State for which a specific punishment is stipulated. Again in our plaintiffs' view such of their conduct as is the subject of these proceedings fits in neatly with the definition of civil contempt in Black's Law Dictionary as to leave no reasonable person in any doubt as to the fact that they were guilty of civil contempt.

Thirdly they argue that the fact that the trial Judge had to be satisfied beyond reasonable doubt of their 'guilt' or that he fined them in default imprisonment does not of itself make the contempt criminal. They cited the case of **Re** Bramblevale [1970] Ch 128 as authority

that the standard of proof and the punishments are usually the same for contempt of court be they civil or criminal.

In their oral arguments the plaintiffs said that it is important to note that the Judge never used the words 'convict' in his judgment. That should be an indication enough that the case before him was not criminal in nature.

Lastly the plaintiffs argue that if the contempt was criminal in nature the prosecution thereof would have been done under section 113the Penal Code by or under the direction of the Director of Public Prosecutions. That it was not clearly shows in the view of our plaintiffs that the matter was civil. A fact vindicated by the fact that the Court went on to award costs.

The defendant has referred us to various cases to show that the contempt herein is criminal.

He says there is no such thing as criminal and civil contempt. Contempt is by its very nature criminal and involves two elements **mens rea** and **actus reus**. See **Attorney General v Times Newspapers** [1992] AC 191 and also **Re Bramblevale Ltd** [1969] 3 ALL ER 1062 where Lord Denning said:

'A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honored phrase it must be proved beyond reasonable doubt'.

Proof enough in the view of the defendant that contempt is criminal in nature.

As to the fact that the Director of Public Prosecutions did not prosecute the contempt or that it was not prosecuted under section 113 of the Penal Code the defendant says that that **per se** does not mean that the contempt is civil. Section 113 only regulates contempt committed in the face of the court but does not take away the efficacy of Order 52 RSC in so far as the enforcement of contempt is concerned.

On our part we think that the matter of whether the contempt herein is civil or criminal is not that complicated. We would have gone straight into that discussion but for the fact that we feel obliged to dispel certain misconceptions that the parties before us seem to have in respect of contempt.

Firstly, and we say this hereinabove as well, there can be no doubt that there is a distinction between civil and criminal contempt.

Secondly it is a misconception to proceed on the basis that it is only criminal contempt that must be proved beyond reasonable doubt. In the **Re Bramblevale** case cited above the court said that proof beyond reasonable doubt is applicable even in civil contempt

cases. This principally because quasi-criminal sanctions are applicable in civil contempt as well. When therefore a court talks of proof beyond reasonable doubt in a contempt case it does not automatically mean that the case is of criminal contempt. It is most likely because that particular case involves criminal contempt. Reference to standard of proof is therefore not a good guide to whether a particular contempt is civil or criminal in nature.

Thirdly it wrong to say that the contempt was civil merely because costs were awarded to one of the parties. Section 33 of the Penal Code and 142 of the Civil Procedure and Evidence Code (CP&EC) allow the award of costs in criminal cease. Indeed in the case of the **Director of Public Prosecutions v Dr Hastings Kamuzu** Banda & Five Others MSCA Criminal Appeal No 21 of 1995(unrep) Miss Cecilia Tamanda Kadzamira was awarded costs. That did not by any stretch of the imagination make it a civil matter.

Fourthly we have to add our voice to the assertion that the mere fact that the contempt herein was not prosecuted by or under the auspices of the DPP or under section 113 of the Penal Code does not make the contempt civil. Section 113 in our opinion codifies contempt in the face of the court. It does not however take away the jurisdiction of the superior court to hear matters of contempt be they civil or criminal.

We must conclude therefore that whether a contempt is civil or criminal has nothing to do with the issues raised by the parties and discussed above. In our view it has everything to do with whether the alleged contempt fits the various definitions of crime and criminal contempt given herein above. We will now proceed to see if they do.

If we go back to such definitions we will recall that a crime has generally been described as being more than antisocial behavior; a wrong that poses a serious threat to society's well being; a wrong that is injurious to the public; and a violation of duties that one owes the society for the breach of which the law attaches sanctions.

A criminal contempt on the other hand is generally described as interference or obstruction of the due administration of justice; interference with the due administration of justice either in a particular case or as a continuous process; and acts calculated to prejudice the due course of justice.

The main issue at this stage is whether the plaintiffs committed a crime/criminal contempt. To answer that question we must take a peek at exactly what it is that the plaintiffs did.

What exactly did the plaintiffs do?

To answer this question we recount what Mkandawire J said in Civil Cause No 1841 of 2001 at pages 17-19 regarding our plaintiffs:

'I now turn to John Tembo. He is the leader of this faction of the Malawi Congress Party. He must have sanctioned the convention. A meeting of this magnitude cannot take place without his approval. I have found he had notice of the injunction. It was within his

powers to stop the convention so as to comply with the court order. He did not. Instead he signified his willingness and desire to be elected President at the Convention and he was indeed elected President. I am aware that he was not a party to the action and I have already dealt with that aspect of the matter. To allow himself to be elected President, it means that he had encouraged that the convention to be held so that he could be elevated to that post. ……. Next, I come to Hon Kainja. She is Secretary General of the Party. …….. Mr. Kampanje Banda called upon Mr. Majoni to chair the convention through her. Before the convention was held, she has written a letter inviting Hon Chakuamba to the convention. This means that Hon Kainja not only participated at the convention but she had also taken part in organizing the same. Indeed the post of Secretary General is crucial to the holding of a convention. I also find her guilty of contempt.'(sic)

Did what they do amount to a serious threat to or cause injury to the public? In the alternative did it interfere or obstruct with the due administration of justice?

Let us look at a few thoughts about this from years before.

Talking about the law of contempt of court the House of Lords said in **Attorney General V Times Newspapers Ltd**[1974] AC 273 **inter alia** that the law of contempt is there to ensure that the authority and administration of the law are maintained. It went further to say that the law must prevent conduct which reduces the court's authority or the respect paid to it or reflects on the proper administration of justice.

In the same case Lord Diplock said at page 307 that in any civilized society it is the function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another. Contempt of court is a generic term that is descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. At page 309 the good judge went to say that contempt of court is punishable because it undermines the confidence not only of the parties to the particular litigation but also of the public as potential suitors, in the due administration of justice by the established courts of law.

Rigby, L J in Seaward v Paterson [1895] ALL ER 1127 said that that there is a jurisdiction to commit for contempt by way of punishment is undoubted. It has been exercised for a very long time- for longer than he could remember. That punitive jurisdiction is founded upon this that it is good not for the plaintiff or a party but for the good of the public that orders of the courts should not be disregarded.

On the local front it is useful to refer to the words in the Canadian case of **Canadian Metal Co Ltd v Canadian Broadcasting Corp(**2) 1975 48 DLR (3rd) 641 at 669 which were quoted with approval by Nyirenda J in the case of **Group Village Headman Kukhaya and Others v Attorney General and Mayi Chatambalala Nkhomola** Civil Case No. 173/93(Lilongwe District Registry). The words are as follows:

'to allow court orders to be disobeyed would be to tread the road towards anarchy. If the orders of the court can be treated with disrespect the whole administration of justice is brought into scorn …. If the remedies that courts grant to correct wrongs can be ignored then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result in the destruction of our society'.

On the obstruction or interference with the due administration of justice the case of Attorney General v Times Newspapers Ltd said that the question to be asked is not whether the contemnors' conduct has actually interfered with or obstructed the administration of justice. It is whether there is a real and substantial risk of it interfering or obstructing the due administration of justice.

Getting back to our questions above in the light of the precedents there must be little doubt that the conduct of our plaintiffs in respect of which they were convicted did pause a serious threat to society and was capable of injuring it. We as well have no doubt that the said conduct posed a real and substantial risk of interfering with and/or obstructing the due administration of justice. Their conduct as given above fits both the definition of a criminal contempt and a crime. And if the point is desirous of further emphasis then there is a lot to be learnt from the case of **Peter Chupa v The Mayor of the** Blantyre City **Assembly(**His Worship Mr. Chikakwiya) & Three Others Civil Case No 133/2001. The defendants also flouted an injunction. The court never took as long as we have done to conclude that the contempt complained of was criminal. Granted this might have been because the defendants never contested that point. they only claimed their innocence. For our purposes however the decision is further proof, if any were needed, that the contempt herein was criminal in nature. That disposes of Paragraph 2 in the Originating Summons.

Did it involve dishonesty or moral turpitude?

We have deliberately not attended to Paragraph 3 on the Originating Summons. In view of our finding that the contempt complained of herein was criminal the question became superfluous.

But to answer our questions above we find it prudent to again define dishonesty and moral turpitude and subsequently determine whether or not our crime fits those definitions or not. Having said that we hasten to add that the law as we understand it does not say that the crime has to involve both dishonesty and moral turpitude. Any one of them in our view will suffice.

Dishonesty

Both parties again relied on the definition in Black's Law Dictionary 6th Ed. At page 468 dishonesty is defined in the following fashion:

Ÿ Disposition to lie, cheat, deceive, or defraud;

Ÿ Untrustworthiness;

Ÿ Lack of integrity;

Ÿ Lack of honesty, probity or integrity in principle;

Ÿ Lack of fairness and straightforwardness;

Ÿ Disposition to defraud, deceive or betray.

Again we have to say that our understanding is that dishonesty equals any one of the above.

Does the crime herein involve dishonesty?

We would have wanted to approach this matter by asking the question whether our plaintiffs conducted themselves in so far as this matter is concerned with honesty. We think however that that sounds too much like looking for easy answers. But having said that perhaps it is important to first look at what the parties think about this.

Our plaintiffs think there was no dishonesty involved. The plaintiffs had no disposition to cheat, lie or defraud. Neither did they exhibit a lack of integrity. They go on to say that they did not even call for the convention. They only attended. And it was such attendance that put them in contempt. And to show that there was no dishonesty the convention was held in broad daylight at a known location.

The defendant on the other hand says there was dishonesty. To prove that they went ahead to, what they called, dissect the definition of dishonesty as given in Black's Law. We feel obliged to reproduce in full the relevant parts of their argument.

' a. lie- a falsehood uttered for purpose of deception. An intentional misstatement of an untruth designed to mislead another.(Black's Law page922)

The plaintiffs committed this crime with a string of lies. They pretended not to have been aware of the court order. When they were called before court to explain themselves, they lied and deceived further by telling the court that they were not aware of the injunction. These lies and their clear intention to deceive and mislead the court and the nation show

their lack of honesty and integrity.

b. Deception - is an act of deceiving i.e. intentional misleading by falsehood spoken or acted (Black's Law page 406).

The plaintiffs intentionally went ahead to hold a convention and by this action mislead the nation.

c. Integrity as defined at page 809 of Black's Law goes to the moral principle and the character as well as honesty and uprightness of an individual.

In this case the plaintiffs would have been honest only if they heeded the court order and not proceed to hold the convention. (Sic)

The circumstances surrounding the holding of that convention show a web of lies, deceit, lack of honesty, integrity as well as moral character and spine from people who want to rule this country.

The defendant also referred us to an article by Carl Thomas in the publication Insight found at www.jewishworldreviews.com where he commented on contempt in the following terms;

'contempt is not just a legal term. Its definition goes to the heart of the character of the person who demonstrates contemptuousness toward the law and courts, the state of mind of one who despises, shows a lack of respect, willful disobedience to or upon disrespect of a court, judge or legislative body'.

We read the article and appreciated it contents. Allow us to say however that it did not seem correct to us that the defendant should give us a website and hope that we have the wherewithal to access it. We would rather the defendant downloaded the article and made it available to us.

The defendant concluded his arguments by saying that the plaintiffs' conduct cast a serious doubt on their morality, honesty and integrity.

Let us say at the outset that we feel, with respect, that the defendant went a bit over the top in its characterization of the plaintiffs. It might be true that our plaintiffs lied on the fact that they had not been served with the relevant injunction. It might also be true that our plaintiffs have ambitions of ruling this country. That quite honestly is none of our business. We would actually turn ourselves into a circus if we busied ourselves thus.

The plaintiffs also fell into the same trap when they said that the banned convention took place in daylight at a known location. Such facts are irrelevancies as they have more to do with the circumstances in which the offence was committed rather than the intrinsic

nature of the offence itself.

Secondly, and as a matter of law, when we talk of whether a crime involves dishonesty or not we do not in getting to that destination consider the circumstances in which the crime was committed. The crime's involvement with dishonesty that should interest us is that which is inherent to the crime. Not that which comes as a result of the manner in which the crime was committed. In that regard it is clear that the defendant's references to the 'lies' much as they are most likely true should not concern us. Similarly the fact that the convention was held in the open at a known location is irrelevant in determining whether the crime involved dishonesty. What should concern us is whether at the mention of criminal contempt of court one immediately conceives a crime that involves dishonesty in that it involves any one of the following:

Ÿ A disposition to lie , cheat, deceive or defraud

Ÿ Untrustworthiness;

Ÿ Lack of integrity;

Ÿ Lack of honesty, probity or integrity in principle;

Ÿ Lack of fairness and straightforwardness;

Ÿ Disposition to defraud, deceive or betray'

We will say now that it seems to us to be stretching matters a wee bit too far to so much as suggest that criminal contempt brings into one's mind images of a disposition to lie, cheat, deceive or defraud or indeed betray. We are of the view that for our purposes we should busy ourselves with integrity, probity, honesty, fairness and straightforwardness or a lack thereof and untrustworthiness. So far we have seen definitions of integrity, probity, honesty, fairness and straightforwardness and trustworthiness garnered from Black's Law. Both parties cited these definitions in this court. We do not have any problems with them. We thought it prudent all the same to see how these terms are defined in the Oxford College Thesaurus.

integrity – at page 424 it is defined as uprightness, honesty, rectitude, righteousness, virtue, probity, morality, honor, goodness, decency, truthfulness, fairness, sincerity, candor; principles ethics.

The second part of integrity refers to nation building. It is irrelevant for our purposes.

Probity – we were unable to find it in the thesaurus. It is clear this term is inbuilt in the definition of integrity. We did manage to find in the **Oxford Advanced Learners'Dictionary**. Is defined as the quality of being honest and trustworthiness;

integrity (see page 991).

Honesty – uprightness, honorableness, honor, integrity, morals, morality, ethics, principle, high principles, righteousness, rectitude, virtue, goodness, probity, worthiness, justness, fairness, incorruptibility, truthfulness, truth, veracity, trustworthiness, reliability, conscientiousness, reputability, loyalty, faithfulness, fidelity.

Fairness –justness, impartiality, evenhandedness, objectivity, disinterest, equitability, equity, legality, properness.

Fairness and straightforwardness – defined only straightforward as, honest, direct, frank, candid, forthright, plain speaking, unambiguous.

Trustworthiness – reliability, dependability, stability staunchness, loyalty, righteous.

Like we have said above the definitions are interlinked. But it will be remembered that we did ask the question whether the plaintiffs conducted themselves with honesty in **Kampanje** Banda and Others v Gwanda Chakuamba. We did say that that was perhaps an easier way of getting to the answer. We went on to further say that the dishonesty that we are looking for is that which is inherent to the crime itself. Accordingly we asked whether at the mention of criminal contempt of court one immediately conjures images of persons prone to lie or deceive or defraud. We said no. Now we have defined the elements of dishonesty that we think are relevant to this case. In the light of those definitions can it be said that criminal contempt conjures up in one's mind persons that are unfair; Lack integrity; lack probity; lack fairness and straightforwardness; and lack trustworthiness? Alternatively did our plaintiffs in disobeying the injunction act as a woman and a man of integrity, fairness, probity, honesty, trustworthiness, and straightforwardness? We have searched high and low. We came to the same conclusions. The first question has to be answered in the positive. The second one has to be answered in the negative. To answer therefore part of the question posed by paragraph 4 of our Originating Summons we answer in the positive. The relevant contempt was a crime involving dishonesty.

Did it involve moral turpitude?

Again we thought it prudent to start with a definition of moral turpitude before we get to determine whether or not the relevant contempt involved moral turpitude.

What is moral turpitude

Our parties again sought assistance from Black's Law. At pages 1008 to 1009 Black's Law defines moral turpitude as:

‘the act of baseness, vileness, or the depravity in private and social duties which man owes to fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man.

Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offences as distinguished from others.

The quality of a crime involving grave infringement of the moral sentiments of the community as opposed to statutory mala prohibita.

In Merriam-Webster’**s New International Dictionary(2nd ed)** moral turpitude is defined as:

‘The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita’.

We also had occasion to look at North American decisions and a statute as to the meaning of moral turpitude. In the case of **Juan Antonio Montero –** Ubri v Immigration and Naturalization Service case number 00 – 1133 heard by the United States Court of Appeals for the First Circuit crime of turpitude was generally understood to mean:

‘conduct ….. contrary to the accepted rules of morality and duties owed between persons or to society in general ….. an act which is per se morally reprehensible and intrinsically wrong.’

In the case of The People v Mentilla, 513 NYS 2d 338 the court said as follows regarding crimes involving moral turpitude:

‘ crimes which do not involve a vicious motive or a corrupt mind, are, therefore not ‘ considered to be crimes involving moral turpitude’.

In that case the court found vehicular manslaughter not to be a crime involving moral turpitude. Neither was a criminal act based on completely unintentional conduct.

In the case of **Phuc** Minh Nguyen v Janet Reno, Attorney General of the United **States of America**, et al Case No 99-1656 decided by the United States Court of Appeals for the First Circuit it was said as follows about moral turpitude:

‘ the focus of the moral turpitude analysis is on the inherent nature of the crime of conviction, as opposed to the particular circumstances of the actual crime committed. …. Moral turpitude refers generally to conduct …. Contrary to the accepted rules of morality and the duties owed between persons or to society in general ….. an act which is per se morally reprehensible and intrinsically wrong’.

We were also referred to the Pennsylvania Code Article 237.9 of which defines crimes involving moral turpitude as including the following:

‘that element of personal misconduct in the private and social duties which a person owes to his fellow human beings or to society in general, which characterizes the act done as an act of baseness, vileness or depravity, and contrary to the accepted and customary rule of right and duty between two human beings.

Conduct done knowingly contrary to justice, honesty or good morals.’

Speaking about the elements of the crime the Code says:

‘ a determination of whether a crime involves moral turpitude will be determined based solely upon the elements of the crime. The underlying facts or details of an individual criminal charge, indictment or conviction are not relevant to the issue of moral turpitude’.

The parties’**arguments**

Our plaintiffs argue that the contempt did not involve moral turpitude because it did not gravely violate the community’s moral sentiments. They said examples of offences involving moral turpitude are rape, defilement, procuring an abortion, unnatural offences, incest as well as all offences under Chapter XV of the Penal Code Cap 7:01.

Maybe not surprisingly the defendant says that criminal contempt is a crime involving moral turpitude. They say that when the plaintiffs committed this offence they flouted the duty they owed to the community to wit to observe the law of the land. Further they say that the plaintiffs scorned justice itself which is the very foundation of law and order. They, in other words, challenged the fundamental supremacy of the law.

For our part we feel that we have given various examples of how contempt is viewed by various courts both in this jurisdiction and outside and also by legal commentators. How it interferes and/or obstructs the due administration of justice; how it results in the loss of respect for our courts; how it may lead to the destruction of our society; how it shows the contemnor’s contemptuousness towards the law, the judges and the courts; and how the

law of contempt is for the good not of, for instance Gwanda Chakuamba in this case, but for the public as a whole.

In Clyde v Grant 1923 SC 789 at 790 the court made the following remarks about contempt of court:

'the phrase contempt of court does not in the least describe the true nature of the class of offence with which we are here concerned…….. the offence consists in interfering with the administration of the law, in impeding and perverting the course of justice …….. it is not the dignity of the court which is offended – a petty and misleading view of issues involved – it is the fundamental supremacy of the law which is challenged'.

To answer the question whether the criminal contempt with which the plaintiffs were convicted is a crime involving moral turpitude we have to proceed in much the same way we did with dishonesty. We have to look at the offence itself and not the circumstances in which it was committed. We must ask ourselves the questions whether the mention of criminal contempt conjures, in one's mind, images of injustice, dishonesty and a lack of good morals; in the alternative whether by disobeying the injunction the plaintiffs conducted themselves in accordance with the accepted rules of morality and duties owed between persons or to society in general.

We find it trite that one of the duties that one owes to others and society in general is to obey the law/court orders. For what the trial judge found were selfish reasons the plaintiffs intentionally disobeyed a lawful order of the court. This court finds such conduct **per se** morally reprehensible and intrinsically wrong. We fail to see how such conduct cannot, once a person is found guilty of criminal contempt on it, make such a crime one involving moral turpitude. We find it as a fact that indeed criminal contempt conjures up images of injustice, dishonesty, and a lack of morals; we also find as a fact that the plaintiffs conducted themselves in breach of accepted rules of morality and duties owed between persons or to society in general. The answer to the second part of Paragraph 4 in the Originating Summons has to be in the affirmative. In other words and using the words used therein the relevant contempt was a crime involving moral turpitude.

Whether an expulsion of the plaintiffs from Parliament was not an infringement of their political rights under section 40 of the Constitution/ Whether section 51(2) is inconsistent with sections 40 and 44(2) of the Constitution

We have decided to consider the above issues together. They are about one and the same thing really. In arguing this head the plaintiffs say that their expulsion from the National

Assembly was in fact a violation of their political rights in terms of section 40 of the Constitution. The said section 40 provides inter alia that subject to the Constitution every person shall have the right:

'to participate in peaceful political activity intended to influence the composition and policies of the Government'.

Excluding them from the National Assembly's activities is therefore a breach of section 40 abovementioned.

Such an argument can only come about if one is reading section 40 in isolation. we have seen above that such is not the correct way of interpreting a Constitution. Section 40 is specifically subject to the Constitution itself. Thus if you go to section 44(2) of the Constitution one finds that the rights bestowed under section 40 are capable of being limited as long as such limitations are 'prescribed by law; are reasonable, are recognized by international human rights standards and are necessary in an open and democratic society'. The proper way of putting across the plaintiffs' concerns was not just to say that the expulsion flouted their section 40 rights but to say that being a limitation it did not comply with section 44(2) of the Constitution in that it is not prescribed by law; it is unreasonable; it is not recognized by international human rights standards and finally that it is not necessary in an open and democratic society. The question being is that the case?

We discussed at length the issue of limitation to rights in the case of **Maggie Kaunda v Rep** Crim Appeal No 8/2001. We said in that case about limitations that first you have to establish that the plaintiffs' right/freedom has been infringed, denied or breached. This is for the plaintiffs to establish on a balance of probabilities. If the answer be in the affirmative then the court goes on to determine whether the limitations provisions(in our case section 44(2) of the Constitution) will save the limitation. That is for the alleged infringer, in this case the defendant, to establish. None of the parties addressed us in the above fashion regarding limitations. The defendant was content to cite the Maggie Kaunda case but make no comment on how the limitations herein should be dealt with. Our plaintiffs on the other hand were content to say only that their expulsion from the National Assembly was a breach of their rights under section 40 abovementioned.

By the obvious fact that the plaintiffs will not until the situation of their seats is retrieved participate in the activities of the National Assembly as members one may conclude that their political rights under section 40 have thereby been infringed. The next question is whether such infringements can be saved by section 44(2) of the Constitution. The answer has to be yes. In the Maggie Kaunda case we said that for a limitation to pass muster it has to pursue a legitimate aim and secondly there has to be a reasonable relationship of proportionality between the means employed to limit the right and the aim sought to be achieved. It is clear that the aim of section 51 of the Constitution is to make sure that undesirables did not make it into the National Assembly. It is equally clear that section 61(1)(e)'s aim was to enable the removal from the National Assembly of any member thereof who became whilst still a member an undesirable in terms of section 52 of the Constitution. The limitation therefore has a legitimate aim unless the plaintiffs

want to get into the House so much they are willing to open the membership to even rapists, defilers, armed robbers.

On the other hand it must be noted that section 61 does not impose a blanket ban. The plaintiffs are free to vote, attend political meetings, demonstrate, stand for office in their political groupings and participate in a host of other political activities. It means there is a reasonable proportionality between the means used and the aim sought to be achieved which is to keep undesirables out of the National Assembly. If the plaintiffs feel their 'expulsion' from the National Assembly infringed their section 40 rights our conclusion has to be that such a feeling is misplaced. The 'expulsion' quite apart from everything else is compliant with section 44(2) of the Constitution.

The above applies with equal force to the plaintiffs' complaints regarding section 51(2)(c). But more than that the plaintiffs (like many people actually) seem to us to be laboring under the belief that one section of the Constitution can be used to abrogate another. This is not possible. See the **Press Trust Case** decisions both in the High Court and in the Malawi Supreme Court of Appeal. The latter court did also express similar sentiments in the Fred Nseula's case. In so far as the plaintiffs' attack on section 51(2) is based on the foregoing belief it must fail. If on the other hand it is based on the fact that it is a limitation then we say that it is a limitation that complies with section 44(2)(c) for the reasons given above and is therefore perfectly constitutional.

Whether the expulsion of the plaintiffs from parliament was not in breach of the human rights enshrined in the Constitution as well as the Universal Declaration of Human rights to which Malawi is a party

Firstly we are not sure we are comfortable with the word expulsion. We said at the beginning that that does not seem to us to reflect what happened in the National Assembly on December 12th and 13th 2002. Secondly we again do not feel comfortable with the interchanging use of parliament and the National Assembly. Thirdly we would have felt happier if the plaintiffs had specified which rights in our Constitution have been engaged. Be that as it may we think we have answered the concerns raised in that paragraph above. The plaintiffs can still exercise most of their section 40 rights. Even in the National Assembly it is only their membership of that august House that has been lost. Otherwise we should imagine they could go sit at whatever appropriate place within the Chamber and listen to the goings on therein like most people do.

Whether the plaintiffs had a real opportunity of hearing considering the way the proceedings of their removal from Parliament were conducted (sic)

This issue gave us anxious moments. On the one hand there is the realization that to decide whether or not the plaintiffs were given a hearing we have to go behind the National Assembly's decision and review the actual proceedings of the House. The question being whether this court has the power to do so.

On the other hand are the views of the Malawi Supreme Court of Appeal in **Fred Nseula v The Attorney General and Malawi Congress Party** MSCA CIVIL APPEAL NO

32/97(unreported) at page 10 where it said:

‘The loss of a seat by operation of law is, in our judgment, contained in section 63(1) of the Constitution and it provides as follows:

63(1)(e) if any circumstances arise that, if he or she were not a member of the National Assembly, would cause that member to be disqualified for election under this Constitution or any Act of Parliament’.

As we understand the Supreme Court a member loses his position by operation of law if she if is found guilty of a crime involving dishonesty or moral turpitude. If we go back to our earlier findings herein that is exactly what we have found. If we go further back that is exactly what the National Assembly found. In our opinion therefore the plaintiffs kind of automatically lost their seats once they were found guilty. The National Assembly only served to confirm the matter since there was doubt as to whether the relevant criminal contempt was a crime involving dishonesty or moral turpitude.

In this scheme of things the plaintiffs allege that they were not heard and that certain Standing Orders were not followed. As we understand them they want the decision of the National Assembly annulled on those bases.

We do not think that we should go into the business of determining whether or not the plaintiffs were heard or whether or not certain Standing Orders were breached. It will be an exercise in futility. Like we have said already the plaintiffs’ seats fell vacant by operation of law because they were found guilty of an offence involving dishonesty or moral turpitude. Even if the plaintiffs succeeded in showing that they were not heard or that some procedures were not followed that is not going to take away the said conviction. They will still be people who have been convicted of an offence involving dishonesty or moral turpitude. They will not be eligible to go back into the House. They will still be barred by section 63(1)(e) abovementioned. The proper course of action for the plaintiffs is not to talk about whether they were heard or not. Or whether Standing Orders were followed or not. It is to challenge the finding that the relevant contempt is a crime involving dishonesty or moral turpitude. We are afraid that in this case at least paragraph 11 of the Originating Summons raises an irrelevant question.

CONCLUSION

As a matter of summing up and just so that we do not leave anybody by the wayside we have answered the plaintiffs’ questions as put in the Originating Summons as follows:

1 The provisions of section 51 of the Constitution apply to a serving member in so far as vacancies are concerned;

2 The relevant contempt was criminal;

3 The relevant contempt was a crime involving dishonesty or moral turpitude;

4 The expulsion of the plaintiffs from the House was not an infringement of their section 40 rights;

5 Section 51(2)(c) is not inconsistent with sections 40 and 44(2) of the Constitution in so far as this case is concerned;

6 The expulsion of the plaintiffs was not in breach of Article 21(1) of the Universal Declaration of Human Rights or any human rights enshrined in our Constitution; and

7 It is irrelevant in the circumstances of this case to decide whether the plaintiffs were afforded a proper hearing or whether the correct procedures were followed before their exclusion from the House.

COSTS

These are in the discretion of the court. The plaintiffs have lost the case. Ordinarily the costs should have followed the event. It appears to us however that the matters they brought to Court are such that even the defendant and many others have benefited. It would be inequitable in those circumstances to award costs to the defendant. Accordingly we order that each party shall pay its own costs.

Delivered in open court at Mzuzu this 27th day of August 2003.

L P Chikopa
JUDGE